IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [illegible]

GEORGE F. MILLER, ET AL.,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

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INDEX

	Pages
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	12
Certificate of Service	13
Entry of Appearance	13
Appendix A—Statutes Cited	14-17
1. Article 5483, Texas Civil Statutes	14
2. Article 5486, Texas Civil Statutes	15
3. 26 U.S.C. 6321	16
4. 26 U.S.C. 6322	17
5. 31 U.S.C. 191	17
Appendix B—Opinion and Judgment Below	18-38
1. Opinion of the Court of Civil Appeals	18
2. Judgment of the Court of Civil Appeals	34
3. Order of the Texas Supreme Court Refusing Petitioners' Application for Writ of Error, with notation no reversible error	36
4. Order of the Texas Supreme Court Overruling Petitioners' Motion fo. Rehearing on their Application for Wrt of Error	37
Appendix C	39-48
1. Final Judgment of the Trial Court	39
2. Finding of Fact and Conclusion of Law of the Trial Court	44

LIST OF AUTHORITIES

Cases:	Pages
Aquilino v. United States, U. S. , 4 L. Ed. 1365, 80 S. Ct.	3, 8
Armstrong, v. U. S., U. S. , 4 L. Ed. 1554, 80 S. Ct.	12
Cocke v. Wright, 299 S. W. 446	9
Exchange Bank & Trust Co. v. Tubbs (5th Cir., 1957) 246 F. 2d 141, cert. denied at 355 U. S. 868	11
Herf & Frericks Chemical Co. v. Brewster, 117 S. W. 880	9
Hovel v. Kaufman, 280 S. W. 185	9
Russell v. Texas & Pac. Ry Co., 68 Tex. 646, 5 S. W. 686	9
Thelusson v. Smith, 2 Wheat 396	11
U. S. v. Atlantic Municipal Corp. (5th Cir., 1954) 212 F. 2d 709	11
U. S. v. Fidelity & Deposit Co. of Maryland (5th Cir., 1954) 214 F. 2d 565	12
United States v. Acri, 348 U. S. 211	7
United States v. Bess, 357 U. S. 51	8
United States v. Brosnan, U. S. , 4 L. Ed. 1192, 80 S. Ct.	8
United States v. Colotta, 350 U. S. 808	7
United States v. Durham Lumber Co., U. S. , 4 L. Ed. 1371, 80 S. Ct.	8
United States v. Gilbert Associates, Inc., 345 U. S. 361	7
United States v. Liverpool & London Glove Ins. Co., 348 U. S. 215	7
United States v. Scovil, 348 U. S. 218	7
United States v. Vorreiter, 355 U. S. 15	7
United States v. White Bear Brewing Co., 350 U. S. 1010	7

	Pages
Texas Revsied Civil Statutes:	
Article 5483	4
Article 5486	4, 5
26 U.S.C.:	
Section 6321	3, 4, 11
Section 6322	4
28 U.S.C., Section 1257 (3)	3
31 U.S.C., Section 191	4, 11
Treatises:	
14 Tex. Jur. 2d 634, Sec. 533	9

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

Petitioners, George F. Miller, Archie C. Chandler, Randolph W. Bohanan, Joe F. Grohman, Tommy Gene Whitt, Benjamin H. Walser, James Lee Glaspy, Epifanio T. Valencia, Thelbert H. Allison and Lisabeth G. Young, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, entered in the above entitled case on January 20, 1960, and the denial of a Motion for Rehearing entered February 10, 1960.

Citation to Opinion Below

The judgment of the trial court, unreported, is appended hereto in Appendix C, *post*, at page 39. The findings of fact and conclusions of law of the trial court are appended hereto in Appendix C, *post*, at page 44.

The opinion of the intermediate appellate court, the Texas Court of Civil Appeals sitting at Austin, Texas, is reported at *331 S.W. 2d 436* and is appended hereto in Appendix B, *post*, at page 18.

The judgment of the Texas Supreme Court, refusing Petitioners' application for Writ of Error on April 27, 1960, is appended hereto in Appendix B, *post*, at page 36. And the judgment of the Texas Supreme Court overruling Petitioners' Motion for Rehearing on May 25, 1960, is appended hereto in Appendix B, *post*, at page 37.

Jurisdiction

The judgment and opinion of the Texas Court of Civil Appeals was entered January 20, 1960; the judgment by the Court of Civil Appeals overruling Petitioners' Motion for Rehearing was entered February 10, 1960; Petitioners' Application for Writ of Error to the Texas Supreme Court was refused without written opinion on April 27, 1960, notation, no reversible error; and Petitioners' Motion for Rehearing in the Texas Supreme Court was overruled May 25, 1960. The Texas Supreme Court is Texas'

court of last resort, and the foregoing constitutes that Court's final judgment on the merits; but under proper practice the Petition for Certiorari is directed to the judgment of the Texas court of Civil Appeals.

The jurisdiction of this Court is invoked under *28 U.S.C. Sec. 1257 (3)*.

Questions Presented

1. Whether Respondent, the United States, is entitled to have established Federal Tax Liens under *26 U.S.C. 6321* upon funds held in "custodia legis" by a liquidating receiver in which funds the taxpayer corporation had no "property" or "rights to property" at the time such liens were sought to be established.

2. Whether the Texas Court of Civil Appeals satisfactorily resolved the question of what "property" or "rights to property" the taxpayer corporation had in the funds held by the receiver since the Court of Civil Appeals did not pass upon that point but based its decision upon an absolute right of the United States to the funds in question upon the ground that the effect of a federal tax lien is exclusively a federal question without regard to any rights created under state law.

3. Whether the judgment of the Court of Civil Appeals is in direct conflict with the recent decision by this Court in *Aquilino v. United States*, ... *U.S.*

....., *4 L. ed. 1365, 80 S. Ct.* , decided on June 20, 1960, since the Court of Civil Appeals held that any rights to the funds in question as created under state law were of no consequence in view of prior decisions concerning competing lien priorities.

4. Whether the Federal Government, under *31 U.S.C. 191*, is entitled to be accorded payment of a debt which is unsecured by any lien or otherwise, in preference to the wage claims of petitioners which are undisputed to have been secured by perfected and valid liens.

Constitutional and Statutory Provisions Involved

The following constitutional and statutory provisions are directly involved and relevant portions are set forth *post* in Appendix A, at the cited page:

1. Article 5483, Texas Revised Civil Statutes, (p. 14).
2. Article 5486, Texas Revised Civil Statutes, (p. 15).
3. 26 U.S.C., Sec. 6321, (p. 16).
4. 26 U.S.C., Sec. 6322, (p. 17.)
5. 31 U.S.C., Sec. 191, (p. 17).

Statement of the Case

Petitioners were all employees of Capitol Coach Manufacturing Company, a Texas Corporation during most of the year 1958. Petitioners were not paid their earned wages, in the amount of $1,130.29, for the months of July and August, 1958. On Au-

gust 30 and September 2, 1958, Petitioners filed liens for these unpaid wages in accordance with the provisions of *Article 5486, Texas Revised Civil Statutes*, against the assets of the corporation and thereby acquired valid first liens upon such assets. (Tr. 46-47; Appendix C, p. 45).

On September 19, 1958, the corporation was placed in receivership by the District Court of Travis County, Texas. (Tr. 47; Appendix C, p. 46), and the receiver, acting under order of the trial court, took possession of all of the property and assets of the corporation for the benefit of its creditors. (Tr. 47-48; Appendix C, p. 46). On November 4, 1958, the receiver sold all of the assets of the corporation. At the time of this sale the only liens upon these assets were those of Petitioners. (Tr. 47-48; Appendix C, p. 46). After the payment of court costs and receivership expenses, the receiver had remaining in his hands from the sale of the corporation assets the amount of $1,000.00. (Tr. 48; Appendix C, p. 48).

On January 12, 1959, Petitioners intervened in the receivership proceedings and moved the trial court to foreclose their liens, to charge the funds held by the receiver with these liens, and to distribute to Petitioners sufficient money to satisfy their liens. (Tr. 48; Appendix C, p. 47).

On January 22, 1959, Respondent assessed certain withholding and unemployment taxes against Capitol Coach and filed notice of a Federal Tax

Lien with the County Clerk of Travis County on January 27, 1959. (Tr. 48; Appendix C, p. 47).

On February 16, 1959, the trial court reduced Petitioners' liens to judgment, foreclosed their liens, and ordered that the remaining $1,000.00 which the receiver held be applied toward the satisfaction of Petitioners' wage claims. (Tr. 48; Appendix C, p. 47). On March 10, 1959, the trial Court entered final judgment in which Petitioners' liens were accorded priority over the Federal Tax Liens. (Tr. 30-32; Appendix C, p. 39).

The proceedings in the trial court were without a jury and the trial court, upon request, filed his findings of fact in which he found that Capitol Coach was divested of both possession and title to all of its assets on September 30, 1958, when the receiver took possession. (Tr. 4748; Appendix C, p. 46).

The Austin Court of Civil Appeals, on January 20, 1960, reversed the judgment of the trial court with instructions to accord Respondent priority over Petitioners in the payment of their respective claims. (Appendix B, p. 34.) The decision of the Court of Civil Appeals ignored Petitioners' Points concerning (1) the undisputed fact that, at the time Respondent sought to impress its liens upon any property belonging to the taxpayer corporation, all of the corporation's assets had been sold by the receiver who held the funds in trust for Petitioners and the corporation had no "property" or "rights

to property" to which the tax liens could attach; and (2) the long standing law of the State of Texas that once a liquidating receiver has taken over the assets of an insolvent corporation, a creditor may not acquire a lien upon such assets held in trust by the receiver. The Court of Civil Appeals relied solely upon the authority of *United States v. Colotta, 350 U. S. 808; United States v. White Bear Brewing Co., 350 U. S. 1010; United States v. Vorreiter, 355 U.S. 15; United States v. Gilbert Associates, Inc., 345 U.S. 361; United States v. Acri, 348 U.S. 211; United States v. Scovil, 348 U.S. 218, and United States v. Liverpool & London Glove Ins. Co., 348 U.S. 215*, and held that, irrespective of what the property rights of a taxpayer which have been created by state law are, the state courts must look to federal law in any and all situations involving federal tax liens. The basis of the decision of the Court of Civil Appeals is adequately summarized by the following paragraph from the opinion:

> "The liens of the Government were acquired by operation of law, paramount Federal law. They were not acquired through any legal process. Even so no state law could deny them effectiveness." *(331 S.W. 2d 436, at p. 443;* Appendix B, p. 33).

Reasons for Granting the Writ

1. In holding that Petitioners' rights under their liens for unpaid wages were governed exclusively by Federal Law and that no State law could be looked to in order to determine what "property"

or "rights of property" the taxpayer corporation had in the funds held by the receiver, the Court of Civil Appeals in this case is in conflict with the opinions of the Supreme Court in *United States v. Bess, 357 U.S. 51; United States v. Brosnan,* *U.S.* , *4 L. ed. 1192, 80 S. Ct.* ; *United States v. Durham Lumber Co.,* *U. S.* , *4 L. ed. 1371, 80 S. Ct.* ; and especially, *Aquilino v. United States,* *U.S.* , *4. L. ed. 1365, 80 S. Ct.* .

In those opinions, the Supreme Court has held that

> "in all cases where the Federal Government asserts its tax lien, the threshold question is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach." And "in answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute'." *Aquilino v. United States, supra,* at *page 1368.*

Petitioners respectfully submit, as did the petitioners in the *Aquilino* case, *supra,* that the Court of Civil Appeals "did not make its determination in the light of these settled principles". The Court of Civil Appeals pointed out in its opinion that the Receiver held $1,000.00 from the sale of corporate

assets and that the corporation was justly indebted to Petitioners in the amount of $1,130.29 for their unpaid wages. The receiver held the funds in trust for Petitioners who held the only liens upon the assets of the corporation at the time the receiver was appointed. The only "property" or "rights to property" which the taxpayer corporation had in or to the funds held by the receiver was the remainder, if any, of the funds left over after the corporation's creditors (Petitioners) had been paid and the costs of the receivership were paid. (Order of the trial court; Tr. 14). Under Texas law, when the property of an insolvent corporation is placed in the hands of a duly appointed receiver, both title and possession to that property is vested in the receiver in trust for the benefit of the creditors. *Russell v. Texas & Pac. Ry. Co., 68 Tex. 646, 5. S.W. 686; Cocke v. Wright, 299 S.W. 446; Herf & Fredricks Chemical Co. v. Brewster, 117 S.W. 880;* and *Hovel v. Kaufman, 280 S.W. 185.*

Under Texas law, the powers of a corporate receiver and any rights of the corporation to the assets held by the receiver depend upon the order of the Court appointing the receiver. *14 Tex. Jur. 2d 634, Sec. 533.* In this case, the fact that the corporation taxpayer had no property or rights to any property held by the receiver to which the federal tax lien could attach could not be made any plainer than the order of the trial court which read:

> "Said Receiver is further authorized and empowered to sell any and all properties or assets of the Capitol Coach Manufacturing Company, Inc. in bulk or in individual pieces, for cash,

subject to approval of such sales by Order of this Court, to the end that all assets and properties of the corporation shall be liquidated for proper distribution to the creditors after payment of all proper expenses of this Receivership, with the remainder, if any, to the said Capitol Coach Manufacturing Company, Inc. or its stockholders as may be hereafter determined by the Court." (Tr. 14).

The only right which was retained by the corporation to the funds in the hands of the receiver was the remainder, if any, of the proceeds left over after all of the creditors had been paid and the costs of receivership were paid. The receiver had remaining in his hands the sum of $1,000.00 after paying the costs of the receivership and Petitioners are conceded to have had just and due debts for their unpaid wages from the corporation in the amount of $1,130.29, which debts were additionally secured by liens upon such funds. It is absolutely impossible to deduct $1,130.29 from $1,000.00 and have any property or right to property left over for the corporation taxpayer to which any federal tax liens could attach.

The contention made by Petitioners in the Court of Civil Appeals that the United States could not acquire tax liens upon funds held by a receiver in which the taxpayer corporation had neither "property" or "rights to property" was not answered by that Court. Instead, the Court of Civil Appeals held that Federal Law, and Federal Law alone, was to be looked to and that "no State law could deny them (federal tax liens) effectiveness." *(331 S.W. 2d 436,*

at *p. 443)*. This question involves whether or not, under Texas law, there is a property interest of the taxpayer corporation in the funds held in trust by the receiver to which the Government's tax liens could attach. It does not involve a conflict between competing lien claimants to be settled solely by the application of federal law as was determined by the Court of Civil Appeals.

2. If the Federal Government had no tax lien upon the funds held in trust by the receiver under *26 U.S.C. 6321*, the fact that the situation involved an insolvent taxpayer is absolutely immaterial. The law is well settled that *31 U.S.C. 191*, providing for priority of payments of debts due the United States, does not create a lien in favor of the United States. Unless the United States in our case had a lien upon the funds held by the receiver, then it is not entitled to any priority under *31 U.S.C. 191*, over the specific and perfected liens of petitioners.

The United States Supreme Court in the very early case of *Thelusson v. Smith, 2 Wheat 396*, held that debts due the United States in insolvency situations, while generally entitled to priority, could only be satisfied out of the debtor's estate, and would not take priority over property previously mortgaged by the debtor.

31 U.S.C. 191 has never been applied to accord payment of an unsecured debt due the United States in preference to a claim secured by a lien as were the claims of petitioners in our case for their unpaid wages. See *Exchange Bank & Trust Co. v. Tubbs (5th Cir., 1957) 246 F. 2d 141*, cert. denied at *355 U.S. 868; U.S. v. Atlantic Municipal Corp. (5th Cir.,*

1954) 212 F. 2d 709; and *U.S. v. Fidelity & Deposit Co. of Maryland (5th Cir., 1954) 214 F. 2d 565.*

For the United States to come in, without any lien of their own, and to displace and take property upon which there is no dispute that petitioners had affixed liens, is not only without judicial precedent in our history but also amounts to a taking by the Government for which compensation would be due under the Fifth Amendment of our Constitution. See the recent case of *Armstrong v. U.S.*, ... *U.S.* ....., *4 L. ed. 1554, 80 S. Ct.* .....

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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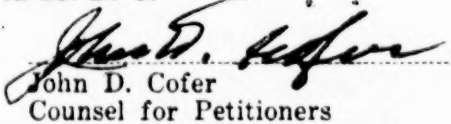
DOUGLASS D. HEARNE
Both of Austin, Texas

Certificate of Service

I hereby certify that a copy of this Petition for Writ of Certiorari has been served upon Respondent by depositing the same in a United States post office, with first class air mail postage prepaid, addressed to the counsel of record for Respondent, namely Hon. Russell B. Wine, United States Attorney for the Western District of Texas, 347 Federal Building, San Antonio, Texas; and a copy to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25. D. C.

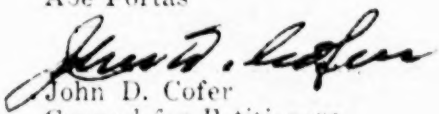


John D. Cofer
Counsel for Petitioners

Entry of Appearance

The undersigned, Abe Fortas, 1229 Nineteenth Street, N. W., Washington 6, D. C., and John D. Cofer, 1408 Capital National Bank Building, Austin 16, Texas, both members of the Bar of the Supreme Court of the United States, hereby enter their appearance in the captioned cause on behalf of Petitioners. The firm of Arnold, Fortas & Porter, 1229 Nineteenth Street, N.W., Washington 6, D. C., and Hume Cofer and Douglass D. Hearne of the firm of Cofer & Cofer, 1408 Capital National Bank Building, Austin 16, Texas, are of counsel.

Abe Fortas



John D. Cofer
Counsel for Petitioners

APPENDIX A

(Statutes Cited)

1. Article 5483, Vernon's Annotated Texas Statutes, Lien Prescribed:

"Whenever any clerk, accountant, bookkeeper, waiter, waitress, cook, maid, porter, servant, employee, artisan, craftsman, factory operator, mill operator, mechanic, quarryman, common laborer, farm hand, male or female, may labor or perform any service in any office, store, hotel, rooming house, boarding house, restaurant, cafe, shop, factory, mine, quarry or mill of any character, or perform any service in the cutting, preparation, hauling, handling, or transporting to any mill or other point for sale, manufacture or other disposition, logs or timber, or perform any service upon any wagon, cart, tram, or railroad, or other means or methods of transporting such logs or timber, and in the construction or maintenance of such tram or railroad, constructed or used for the transportation of logs or timber to or for such mills to its owner or operator, or to points for sale, shipment or other disposition, or any farm hands, under or by virtue of any contract or agreement, written or verbal, with any person, employer, firm or corporation, or his, her, or their agent, receiver or trustee, in order to secure the payment of the amount due or owing under such contract or agreement, written or verbal, the hereinbefore mentioned employees shall have a first lien upon all products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise,

chattels, wagons, carts, tram roads, railroads, rolling stock and appurtenances, or thing or things of value of whatsoever character that may be created in whole or in part by the labor or that may be used or useful by such person or persons or necessarily connected with the performance of such labor or service, which may be owned by or in the possession or under the control of the aforesaid employer, person, firm, corporation, or his or their agent or agents, receiver or receivers, trustee or trustees; provided, that the lien herein given to a farm hand shall be subordinate to the landlord's lien provided by law."

2. Article 5486, Vernon's Annotated Texas Statutes, Liens, how fixed:

"Whenever any person, employer, firm, corporation, his, her or their agent or agents, receiver or receivers, trustee or trustees, shall fail or refuse to make payments as hereinafter prescribed in this law, the said clerk, accountant, bookkeeper, waiter, waitress, cook, maid, porter, servant, employee, farm hand, artisan, craftsman, operative, mechanic, quarryman, or laborer, who shall have performed service of any character, shall make or have made duplicate accounts of such service, with amount due him or her for the same, and present, or have presented, to aforesaid employer, person, firm or corporation, his, her, or their agent or agents, receiver or receivers, trustee or trustees, one of the aforesaid duplicate accounts within thirty (30) days after the said indebtedness shall have accrued. The other of the

said duplicate accounts shall, within the time hereinbefore prescribed, be filed with the county clerk of the county in which said service was rendered, and shall be recorded by the county clerk in a book kept for that purpose. The party or parties presenting the aforesaid account shall make affidavit as to the correctness of the same. A compliance with the foregoing requirements in this Article shall be necessary to fix and preserve the lien given under this law; and the liens of different persons shall take precedence in the order in which they are filed; provided, that all persons claiming the benefit of this law shall have six months within which to bring suit to foreclose the aforesaid lien; and provided, further, that a substantial compliance with the provisions of this Article shall be deemed sufficient diligence to fix and secure the lien hereinbefore given; provided, that any purchaser of such products from the owner thereof shall acquire a good title thereto, unless he has at the time of the purchase actual or constructive notice of the claim of such lienholder upon such products, said constructive notice to be given by record of such claim, as provided for in this law, or by suit filed."

3. 26 U.S.C. 6321, Lien for taxes:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all prop-

erty and rights to property, whether real or personal, belonging to such person."

4. 26 U.S.C. 6322, Period of lien:

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

5. 31 U.S.C. 191, Priority established:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

APPENDIX B

(Opinion and Judgment of the Court Below)

IN THE

COURT OF CIVIL APPEALS

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

No. 10,721

UNITED STATES OF AMERICA, APPELLANT

vs.

GEORGE F. MILLER ET AL, APPELLEES

FROM DISTRICT COURT OF TRAVIS COUNTY,
126TH JUDICIAL DISTRICT,
NO. 111,719, HONORABLE JACK ROBERTS, JUDGE

This suit involves the relative priority of labor liens fixed under the provisions of Art. 5486, V.A.C.S.[1] and claims (based on liens and priorities) of the United States for withholding and unemployment taxes as against the assets of an insolvent taxpayer-employer.

The material facts are undisputed. They are:

Appellees are George F. Miller and nine other persons who were employees of Capitol Coach Man-

[1] The only provision of this article of significance here is the requirement ". . . that all persons claiming the benefit of this law shall have six months within which to bring suit to foreclose the aforesaid lien . . ." If suit is not so brought the lien is lost. Security Trust Co. of Houston v. Roberts, 208 S.W. 892 (Tex. Comm. of App.)

ufacturing Company, Inc., during most of 1958. These employees were not paid their earned wages, aggregating $1130.29 for the months of July and August, 1958. On August 30 and September 2, 1958, these employees filed liens for their unpaid wages in accordance with the provisions of Art. 5486, V.A.C.S.

On September 19, 1958, Capitol Coach was placed in receivership by the Court below. On November 4, 1958, all assets of the insolvent corporation were, by order of the Court, sold for $2650.00. On January 12, 1959, appellees intervened in the receivership proceedings and prayed that their liens be foreclosed and their claims paid out of the money received from the sale of the corporate assets.

The Commissioner of Internal Revenue having assessed certain withholding and unemployment taxes against Capitol Coach, on January 22, 1959, filed notice of a Federal Tax Lien with the County Clerk of Travis County on January 27, 1959, in the amount of the assessed taxes.

On February 16, 1959, the Court established and foreclosed appellees' liens and ordered that the funds held by the receiver after paying costs of Court and receivership, $1,000.00, be applied toward the satisfaction of appellees' claims. Nothing, of course, remained for the Government.

The Trial Court filed these conclusions of law:

"1. The employees perfected and fixed their liens upon the specific property of the corpora-

tion prior to the commencement of the Receivership action and prior to the filing by the United States Government of its Federal Tax Liens.

"2. The employees' liens have priority over all other claims filed with the Receiver, including the Federal Tax Liens."

Appellant has two points, the first of which is that the Court erred in not recognizing as paramount the lien of the United States under Secs. 6321, 6322 and 6323 of the Internal Revenue Code of 1954. (26 U.S.C.A., Secs. 6321, 6322, 6323, respectively.)

Sections 6321, 6322 and the pertinent portion of 6323 read:

"Sec. 6321. Lien for Taxes.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

"Sec. 6322. Period of Lien.

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

"Sec. 6323. Validity against mortgagees, pledgees, purchasers, and judgment creditors.

"(a) Invalidity of Lien Without Notice.—Except as otherwise provided in sub-section (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purhcaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

"(1) Under state or territorial laws—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

"(2) With clerk of district court—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

"(3) With clerk of district court for District of Columbia—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia."[2]

It is well settled that the effect of a lien in relation to a provision of Federal law for the collec-

[2] These provisions are in all material respects similar to those contained in Secs. 3670, 3671, 3672(a), (b), (1), and (2) of the 1939 Internal Revenue Code and the decisions construing the earlier statutes are deemed applicable here.

tion of debts owing the United States is always a Federal question. United States v. Security Trust & Savings Bank of San Diego, 340 U. S. 47, 95 L. ed 53 (1950).

It is our opinion that the question here presented has been decided many times by the Supreme Court of the United States adversely to appellees.

In United States v. Colotta, 79 So. 2d 474, by the Supreme Court of Mississippi, the question was stated to be:

> "The question presented on this appeal is whether a tax lien of the United States for delinquent income taxes is prior in right to a mechanic's lien asserted under Section 356 et seq., of the Mississippi Code of 1942, where the Federal tax lien attached subsequent to the effective date of the mechanic's lien."

In the course of the opinion the Court stated:

> "It is the contention of the appellant, however, that the mechanic's lien granted by the Mississippi statute until perfected by judgment, is contingent or inchoate and that it amounts to no more than a lis pendens notice that the right to perfect a lien exists. To this we do not agree. The contention of the appellant is based upon the provision of the statute requiring that any person entitled to and desiring the benefit of the lien shall commence his suit in the circuit court within twelve months next after the time when the money became due and payable. This provision of the State statute merely provides a

> limitation upon the period within which suit may be begun to enforce the lien. In other words, the statute preserves the lien in effect for a period of twelve months but not longer. The existence of the lien during this twelve months period is not disturbed."

Federal cases aside, the Mississippi Supreme Court in Colotta wrote a strong and well reasoned opinion sustaining the priority of the mechanic's lien over the Federal Tax Lien.

This case was carried to the United States Supreme Court which in a memorandum opinion found in 350 U.S. 807, 100 L. ed 725, held, and we quote the opinion in full:

> "Per Curiam: The petition for writ of certiorari in this case is granted and the judgment is reversed. Mr. Justice Douglas dissents."

In United States v. White Bear Brewing Co., Inc., 227 F. 2d 359, a case very similar to Colotta, the Circuit Court of Appeals for the Seventh Circuit held a recorded mechanic's lien superior to a subsequent Federal Tax Lien. In the course of the opinion it was stated:

> "We think both the government and Deutsch [mechanic's lien holder] had liens and by force of the applicable statutes were, respectively required, to bring suit 'to enforce (their) liens.' Clearly, these two liens simply had different periods of gestation."

The Court, one Justice dissenting, concluded:

> "Since we do not find ourselves barred legislatively from adherence to the principle of time priority enunciated in the New Britain case, still unreversed, we will follow it. Of course the most serious deference is to be accorded Security Trust & Savings Bank, Acri Liverpool & London Ins. Co., and Scovil opinions, yet we think in the factual setting presented by the current appeal, the issue of relative priority must yield to the rule reported by Chief Justice Marshall, quoted in New Britain and adumbrated by Mr. Justice Story. We are unable to view § 3670 as a citadel for the federal tax lien invulnerable to the time when Deutsch's lien attached to the taxpayer's property."

This case was carried to the United States Supreme Court whose memorandum opinion, 350 U. S. 1010, 100 L. ed 871, we quote in full:

> "The petition for writ of certiorari is granted and the judgment is reversed."

Mr. Justice Douglas, joined by Mr. Justice Harlan, dissented and we quote from his opinion:

> "The Court apparently holds that under 26 USC § 3670 a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment. That is new doctrine, not warranted by our decisions, and supportable only if the New Britain Case were overruled."

In United States v. Vorreiter, by the Supreme Court of Colorado, 307 P. 2d 475, (1957), the Court considered the relative priority of mechanic's and laborer's liens over Federal tax liens. The Government contended that such liens "being inchoate, imperfected liens, are inferior to the tax liens of the United States which arose and were recorded before Vorreiter's liens were reduced to judgment." In overruling this contention the Court said:

> "It must be remembered that when the federal lien attached, the improvements giving rise to the plaintiff's liens were not in existence. To permit the federal government to have the benefit of the value of these improvements would be to present it with a windfall. If the government were to succeed, it would in effect be collecting the taxes owing by Price, by appropriating the labor and materials of the lien claimants integrated into his property in Colorado; would be unjustly enriched at the expense of third parties, these lien claimants, and would be receiving more than the property to which the lien attached. We believe and so hold that upon the record before us the government's position cannot be sustained."

We also quote from the concurring opinion of Chief Justice Moore:

> "The federal statute provides that the lien claimed by the government 'shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed * * *' as provided by state law. Justice clearly requires an interpretation that the

> mechanics' lienholders in this case, who had no notice actual or constructive, are included within these exemptions. If this cannot be done the statute does violence to the constitution in that it deprives the workmen of the fruits of their labor without due process of law."

This case was carried to the United States Supreme Court whose memorandum opinion appears in 355 U. S. 15, 2 L. ed 2d 23, which opinion we quote in full:

> "The petition for writ of certiorari is granted. The judgment of the Supreme Court of Colorado is reversed. United States v. Security Trust & Sav. Bank, 340 US 47, 95 L. ed 53, 71 S. Ct. 111."

We will review the case cited in this opinion and which we have previously cited. The question there, as stated by the Court was:

> "The question presented here is whether a tax lien of the United States is prior in right to an attachment lien where the federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment."

We quote further from that opinion:

> "Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court. On the other hand, if the state

court itself describes the lien as inchoate, this classification is 'practically conclusive.' Illinois ex rel. Gordon v. Campbell, 329 US 362, 371, 91 L ed 348, 355, 67 S Ct 340. The Supreme Court of California has so described its attachment lien in the case of Puissegur v. Yarbrough, 29 Cal. 2d 409, 412, 175 P. 2d 830, by stating that, 'The attaching creditor obtains only a potential right or a contingent lien . . .' Examination of the California statute shows that the above is an apt description. The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect a lien exists.

"Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded Morrison did not have a judgment lien. He had a mere 'caveat of a more perfect lien to come.' New York v. Maclay, 288 US 290, 294, 77 L. ed. 754, 757, 53 S. Ct. 323.

". . .

"In cases involving a kindred matter, i.e. the federal priority under Rev. Stat. § 3466, it

has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. Illinois ex rel. Gordon v. Campbell, supra (329 US 374, 91 L ed 357, 67 S Ct 340). If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien of Morrison, and the judgment of the District Court of Appeal for the Fourth Appellate District is reversed."

Other United States Supreme Court cases of similar import are: United States v. Gilbert Associates Inc., 345 U.S. 361, 97 L. ed 1071, United States v. Acri, 348 U.S. 211, 99 L. ed 264 and United States v. Scovil, 348 U.S. 218, 99 L. ed 271, United States v. Liverpool & London Glove Ins. Co., 348 U.S. 215, 99 L. ed 268.

We quote the following from Acri:

"In argument it was pointed out that the statute of California involved in the Security Trust Case was different because California courts had held an attachment lien to be inchoate and a mere notice of a more perfect lien to come, while Ohio courts had held it to be an execution in advance and a lien perfected as of the time of attachment. This distinction is immaterial for purposes of federal law. This case

is not to be distinguished from United States v. Security Trust & Sav. Bank, 340 US 47, 95 L ed 53, 71 S Ct 111, and the judgment is Reversed."

In Liverpool the Court reversed the Circuit Court of Appeals for the Fifth Circuit which had held that a lien obtained under our garnishment statutes (Title 68, V.A.C.S.) was superior to federal tax liens. We quote from the opinion of the Circuit Court:

"The important question here is whether at the time the Government's income tax lien arose appellee's garnishment lien possessed 'the characteristics of a specific perfected lien which alone bars the priority of the United States.' See United States v. Knott, 298 U.S. 544, 56 S. Ct. 902, 905, 80 L. Ed. 1321. The issue thus concerns the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States, which has always been considered a federal question. Hence the Supreme Court has consistently held that while a state court's characterization of a lien as specific and perfected is entitled to weight, it is subject to reexamination by the federal courts. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' Illinois ex rel. Gordon v. Campbell, 329 U.S. 362, 371, 67 S. Ct. 340, 91 L. Ed. 348.

"In this case the United States first argues that under the law of Texas the lien of the appellee furniture company was inchoate and

that therefore we may reverse the judgment on this basis. More specifically it argues that in Texas a garnishing creditor's rights in the property are purely potential and contingent until judgment is entered establishing the garnishment lien. We do not at all agree.

"Under the law of Texas, as expressed by statute and the decisions of its highest court, a garnishment is virtually a process of attachment and the service or levy of the writ of garnishment or attachment upon personal property creates a lien from the date of the levy, giving to the creditor a paramount right to such property itself as a security for the satisfaction of his demand. Focke v. Blum, 82 Tex. 436, 17 S.W. 770; Buerger v. Wells, 110 Tex. 566, 222 S.W. 151; Kanaman v. Hubbard, 110 Tex. 560, 222 S.W. 151; United States v. Yates, Tex. Civ. App., 204, S.W. 2d 399, writ refused. See also, In re Jones, D. C., 42 F. 2d 269; Vol. 27 Texas Jur., Sec. 37, page 500, where the rule is announced as follows: 'The levy under a valid writ of attachment or execution places the property levied on within the custody of the law. It has, generally speaking, the effect of segregating that portion of the debtor's property which is necessary to satisfy a money judgment against him.' The United States does not claim that the appellee failed to take any step to validate its writ of garnishment in conformity with the laws of Texas. In United States v. Yates, supra, it was held that an attachment lien filed according to law was specific, perfected and fixed upon the date of its levy and took priority, as of the date the writ was served, over a lien filed by the government

> for withholding and social security taxes filed subsequently thereto, but before the judgment of the court established and foreclosed the attachment lien. We think this decision correctly sets forth the law of Texas, regardless of what might be the law in other jurisdictions. The authorities cited by the government are clearly distinguishable on their facts and do not at all support its contention that in Texas, a garnishing creditor's rights in the property at the time of garnishment are 'purely potential and contingent.' On this phase of the question the appellee furniture company must prevail."

We quote the following from the opinion of the United States Supreme Court reversing the Circuit Court:

> "The question of priorities is identical with that of Acri, No. 33, this day decided, and United States v. Security Trust & Sav. Bank, 340 US 47, 95 L ed 53, 71 S Ct 111. On the authority of those cases we hold the tax liens of the United States superior to the lien of the garnisher."

With respect to our statute involved here (Art. 5486) which requires institution of a suit to foreclose the lien we call attention to the case of Higginbotham-Bailey Logan Co. v. Bellah, 79 S.W.2d 907, by the Fort Worth Court of Civil Appeals, which holds that a laborer's lien under this statute conferred no possessory rights on the lienholder. This but illustrates the restrictive character of the lien and the need for judicial process to render it beneficial.

Unless our decision is to suffer the same fate as that suffered by decisions of the Supreme Courts of Mississippi and Colorado, the Circuit Court of Appeals for the Fifth Circuit and other courts, we must decree superiority of the Federal tax liens.

It is our opinion that in the above cases every conceivable reason has been pressed upon the Supreme Court to change the course of law in regard to the question before us, all to no avail. Further discussion, if not impossible, is certainly futile.

Appellees specifically and additionally contend that since the property of the Capitol Coach was placed in receivership and sold before the Government filed its tax liens there was no property or rights to property under Art. 6321, 26 U.S.C.A., supra, to which the liens could attach.

It is true that the property of Capitol Coach altered its form from chattels to cash by the receiver's sale. Assuming the legality of the sale, the proceeds constitute property and is subject to proper disposition by the receivership court. Sec. 112, Receivers, Vol. 36 Tex. Jur.

Besides if appellees are correct then since the property was sold before they sued to, as they say, "foreclose their liens upon the property of the cor-

"The form into which property changes is not material, for equity will follow the property into whatever form it may assume in order to secure it for the person entitled to it." 18 C.J.S. p. 46.

poration" there would be no property to foreclose upon. Appellees, however, prayed that their claims be satisfied from the cash the receiver had realized from the sale of the corporation property. The United States asks no more.

Appellees also contend that since the United States had no lien when the corporation was placed in receivership it could not subsequently obtain a lien on the property in the receiver's hands. The Texas authorities cited to support this point are 11-A Tex. Jur., Corporations, Sec. 641, p. 71 and the cases it cites. We quote from Sec. 641:

> "Liens upon corporate property are not destroyed by the appointment; but after a liquidating receivership has been ordered a creditor may not acquire a lien on corporate assets by legal process."

The liens of the Government were acquired by operation of law, paramount Federal law. They were not acquired through any legal process. Even so no State law could deny them effectiveness.

If there remains any doubt about our decision then consideration should be given to the following portion of Sec. 191, Title 31, U.S.C.A.

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay

all the debts due from the deceased, the debts due to the United States shall be first satisfied; . . ."

We are satisfied that our decision is correct independently of this statute and for this reason we will not prolong this opinion by reviewing the many cases construing it.

The judgment of the Trial Court is reversed and this cause is remanded with instructions to accord appellant priority over appellees in the payment of their respective claims.

/s/ Robert G. Hughes

Robert G. Hughes,
Associate Justice

Reversed and Remanded
with Instructions
Filed: January 20, 1960.

COURT OF CIVIL APPEALS

THIRD SUPREME JUDICIAL DISTRICT,

AUSTIN, TEXAS

JUDGMENT AND ORDERS IN CONNECTION WITH NOS. 4 AND 5 OF PRAECIPE

JUDGMENT ENTERED JANUARY 20, 1960

UNITED STATES OF AMERICA

VS. NO. 10,721

GEORGE F. MILLER ET AL

APPEAL FROM 126 DISTRICT COURT
OF TRAVIS COUNTY

OPINION BY ASSOCIATE JUSTICE HUGHES

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is reversed and the cause is remanded with instructions to accord appellant priority over appellees in the payment of their respective claims. It is FURTHER ordered that the appellees pay all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance.

- - - - -

ORDER ENTERED FEBRUARY 10, 1960

OVERRULING APPELLEE'S MOTION FOR
REHEARING

MOTION NO. 12,239)
CAUSE NO. 10,721)

United States of America v. George F. Miller et al

Appeal from 126 District Court of Travis County

Appellee's Motion for Rehearing

Motion is submitted and overruled

IN THE SUPREME COURT OF TEXAS

April 27, 1960.

No. A-7764.

George F. Miller et al.)
vs.) From Travis County;
United States of America) Third District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Third Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicants, George F. Miller, Archie C. Chandler, Randolph W. Bohanann, Joe F. Glaspy, Epifanio T. Valencia, Thelbert H. Allison and Lisabeth G. Young, pay all costs incurred in this application.

- - - - -

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of the Supreme Court of Texas on application for writ of error in the case of George F. Miller et al. vs. United States of America, No. A-7764, from Travis County, Third District, as such judgment appears of record in the minutes of said Court under date of April 27, 1960.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 11th day of July, 1960.

GEO. H. TEMPLIN, Clerk

(SEAL)

By /s/ Carl B. Lyda, Deputy

IN THE SUPREME COURT OF TEXAS

May 25, 1960.

No. A-7764.

George F. Miller et al.)
vs.) From Travis County,
United States of America) Third District.

Petitioners' motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas on motion for rehearing of application for writ of error in the case of George F. Miller et al. vs. United States of America, No. A-7764, from Travis County, Third District, as such order appears of record in the minutes of said Court under date of May 25, 1960.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 11th day of July, 1960.

GEO. H. TEMPLIN, Clerk

(SEAL)

By s/ Carl B. Lyda, Deputy.

APPENDIX C

BOOK 184

CIVIL MINUTES, 126th DISTRICT COURT, TRAVIS COUNTY

March Term: 1959, Thursday the day of March, 1959.

No. 111,719

IN THE 126TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

LONNIE L. CRIDER

v.

CAPITOL COACH MANUFACTURING COMPANY, INC., AND DELBERT A. LEWIS

FINAL JUDGMENT ON PRIORITIES OF CLAIMS AND ORDER DIRECTING RECEIVER TO DISTRIBUTE ASSETS

On this 4th day of March, 1959, a day in the regular term of this Court, came on to be heard the motion of George F. Miller, Archie C. Chandler, Randolph W. Bohanan; Joe F. Grohmann, Tommy Gene Whitt, Benjamin H. Walser, James Lee Glapsy, Epifanio T. Valencia, Thelbert H. Allison and Lisabeth G. Young, heretofore filed in the above styled and numbered cause wherein said movents have applied for a distribution by the Receiver herein to them of their unpaid laborers' wage liens from the money which

the Receiver has realized from the sale of the assets of Capitol Coach Manufacturing Company, Inc. The lien claimant movents appeared herein by their attorneys of record, Cofer & Cofer. The Receiver, Russell James Horn, appeared in person and by his attorney, Arthur Mitchell. The United States Government, having heretofore filed tax liens for Federal Withholding taxes, appeared by and through its attorneys, Arthur L. Luethcke and William H. Gray. The Texas State Unemployment Commission having heretofore filed its claim with the Receiver for unpaid payroll taxes, appeared by and through its attorney, Jack Goodwin. And the plaintiff, Lonnie L. Crider, appeared by and through his attorney, James R. Sloan. All parties announced ready. No jury having been demanded, all matters of fact and of law were submitted to the Court for determination.

Having heard the pleadings and the evidence and the arguments of the respective counsels wherein each party urged the priority of his respective claims and cited to the Court authorities in support of such priority, and it appearing to the Court that said movents are employees of Capitol Coach Manufacturing Company, Inc., and its president, Delbert A. Lewis, the defendants in said cause, and it appearing to the Court that said movents, were employed by Capitol Coach Manufacturing Company, Inc., and its president, Delbert A. Lewis, during the year 1958 as laborers and employees engaged in the construction, fabrication, and manufacturing of mobile house trailers by said Corporation at its plant located at 109 Industrial Boulevard, Austin, Texas, and it ap-

pearing to the Court that said Corporation, by virtue of oral contracts of labor with said employees, became indebted to said employees for wages for their compensation which became due and accrued commencing on the 1st day of August, 1958, and continuing through the month of August, 1958, and it appearing to the Court that said Corporation has failed and refused to make payments to said employees for these accrued wages although due demand for same was made upon said Corporation and its president, and it appearing to the Court that said employees, while so engaged as laborers by said Corporation created certain unfinished house trailers and used certain tools, machinery, materials, and supplies which were owned by or in the possession of said Corporation and located at 109 Industrial Boulevard, Austin, Texas, and it further appearing to the Court that said employees presented to the president of said Corporation, Delbert A. Lewis, an account of their wages which commenced coming due on August 1, 1958, and thereafter, within 30 days after the said indebtedness for wages accrued, and that said employees, within the time prescribed by law, duly filed with the County Clerk of Travis County, Texas, sworn affidavits setting forth said account for unpaid wages which were definite and specific and fixed as to amount and which were duly and timely recorded, and it appearing to the Court that said George F. Miller, Archie C. Chandler, Randolph W. Bohanan, Joe F. Grohmann, Tommy Gene Whitt, Benjamin H. Walser, James Lee Glaspy, Epifanio T. Valencia, Thelbert H. Allison, and Lisabeth G. Young have valid and subsisting laborers'

leins upon the above mentioned unfinished house trailers, tools, machinery, materials, and supplies which were owned by or in the possession of Capitol Coach Manufacturing Company, Inc., at 109 Industrial Boulevard, Austin, Texas, and it further appearing to the Court that said liens were filed and perfected prior to September 19, 1958, the date upon which this receivership action was commenced, and it appearing to the Court that thereafter, on January 12, 1959, after the Receiver had sold the assets of said corporation upon which these liens existed, these movents intervened in this action, moved this Court to foreclose their liens upon the specific property sold by the Receiver and to order the Receiver to distribute to these movents an amount from said proceeds to satisfy these liens, and it appearing to the Court that the United States Government filed Federal Tax liens for Federal withholding taxes upon the property of said corporation on January 21, 1959, and January 26, 1959, and it appearing to the Court the State Unemployment Commission has failed to file and perfect any lien for unpaid payroll taxes and it appearing to the Court that these movents' liens were foreclosed by this Court upon the specific property of Capitol Coach Manufacturing Company, Inc., on February 16, 1959, and said order charged the money in the hands of the Receiver for the satisfaction of the debts due those movents by said corporation and for the satisfaction of the liens securing said debts, and it appearing to the court that these laborers' liens have priority over all other claims which have been filed with the Receiver, and it appearing to the Court

that the Receiver now holds $1,000.00 over and above all costs and expenses of this Receivership which money was realized from the sale of the assets of Capitol Coach Manufacturing Company, Inc.;

It is ORDERED, ADJUDGED AND DECREED that Russell James Horn, the Receiver herein, pay to George F. Miller, Archie C. Chandler, Randolph W. Bohanan, Joe F. Grohmann, Tommy Gene Whitt, Benjamin H. Walser, James Lee Glaspy, Epifanio T. Valencia, Thelbert H. Allison, and Lisabeth G. Young the sum of $1,000.00 from the cash which the Receiver now holds, by drawing a check in said amount payable to Cofer & Cofer, attorneys of record for said lien claimants.

Done and ordered entered, this 10th day of March, 1959.

Jack Roberts
Judge of the 126th Judicial
District Court of Travis
County, Texas

Approved as to form:
James R. Sloan

NO. 111,719

IN THE 126TH JUDICIAL
DISTRICT COURT OF
TRAVIS COUNTY, TEXAS

LONNIE L. CRIDER

v.

CAPITOL COACH MANUFACTURING
CO., INC., ET AL

FINDINGS OF FACT AND CONCLUSIONS of LAW

In response to the request of the United States of America, intervenor in the above entitled and numbered cause, I make and file the following as my findings of fact and conclusions of law therein:

1. During the year 1958, Capitol Coach Manufacturing Company, Inc., a corporation formed under the laws of the State of Texas, was engaged in the fabrication, manufacturing, and assembly of mobile house trailers. The president of the Corporation was Delbert A. Lewis and the plant and equipment used by the corporation was located at 109 Industrial Boulevard, Austin, Texas.

2. During the term of operation of said Corporation in 1958, the Corporation had in its employ George F. Miller, Archie C. Chandler, Randolph W. Bohanan, Joe F. Grohmann, Tommy Gene Whitt, Benjamin H. Walser, James Lee Glaspy, Epifanio T. Valencia, Thelbert H. Allison, and Lisabeth G. Young. All of these persons were employed by the Corporation as craftsmen, mechanics, and machine operators and were engaged in the fabrication, manufacturing, and assembly of mobile house trailors at the plant site of said corporation.

3. The Corporation failed and refused to pay these employees the wages which they had earned for the months of July and August, 1958, and which the Corporation, by and through its president, Del-

bert A. Lewis, had become obligated to pay by virtue of oral contracts of labor with said employees.

4. Thereafter, on August 30, 1958, and September 2, 1958, the employees duly filed with the County Clerk of Travis County, Texas, sworn affidavits setting forth accounts for their unpaid wages which were due them for the month of August, 1958, and which were definite and specific and fixed as to the following amounts:

George F. Miller	$ 97.31
Archie C. Chandler	238.21
Randolph W. Bohanan	101.05
Joe Grohmann	126.29
Tommy Gene Whitt	114.36
Benjamin H. Walser	49.95
James Lee Glaspy	162.84
Epifanio T. Valencia	58.25
Thelbert H. Allison	111.79
Lisabeth G. Young	70.24
	$1130.29

5. By virtue of Article 5483, Texas Revised Civil Statutes, 1925, these employees thereby acquired valid first liens upon the unfinished house trailers, tools, machinery, materials, and supplies which were owned by or in the possession of Capitol Coach Manufacturing Company, Inc., which were located at 109 Industrial Boulevard, Austin, Texas, and which were created by said employees and which were used by said employees in the fabrication of mobile house trailers.

6. Said employees did and performed each and every act and thing enumerated and prescribed by Article .5486, Texas R.C.S. concerning the fixing and preserving of the employees' liens for unpaid wages for the month of August, 1958, as provided by Article 5483, Texas R.C.S.

7. Thereafter, on September 19, 1958, this receivership action was commenced by the Petition of Lonnie L. Crider, one of the creditors and stockholders of the corporation. Russell James Horn was appointed Receiver on September 30, 1958, and immediately took possession of all of the assets of Capitol Coach Manufacturing Company, Inc.

8. The assets of the Corporation which the Receiver took possession of were the unfinished house trailers, tools, machinery, materials, and supplies owned by the Corporation and located at its plant site at 109 Industrial Boulevard, Austin, Texas, and were the same assets upon which the employees of said Corporation had specifically listed in their affidavits and upon which they had previously acquired liens. When the Receiver took possession of these assets, the owner, Capitol Coach Manufacturing Company, Inc., was divested of both possession and title of these assets.

9. On November 4, 1958, the Receiver applied to this Court for, and obtained, an order approving the sale of the assets of the corporation for a cash bid of $2,650.00. The assets were sold by the Receiver at this time.

10. On January 12, 1959, the employees of the Corporation intervened in the Receivership proceeding and moved this Court to foreclose their liens upon the specific assets of the Corporation and to order the distribution of the money received by the Receiver for the sale of these assets to satisfy their liens.

11. Thereafter, on January 27, 1959, the United States Government filed with the County Clerk of Travis County, Texas, a Notice of Federal Tax Lien against the Capitol Coach Manufacturing Co., Inc., in the following amounts:

Withholding taxes for the 2nd Quarter of 1958	$1,108.09
Federal Unemployment taxes for 1958	373.91
	$1,482.00

These Federal Taxes were assessed on January 22, 1959.

12. On February 16, 1959, this Court reduced to judgment and foreclosed the employees' liens upon the specific property of Capitol Coach Manufacturing Company, Inc., and ordered the money in the hands of the Receiver charged for the satisfaction of the debts due these employees.

13. At the time the Receivership action was commenced, the corporation was insolvent.

14. The receiver has liquidated all of the assets of the Corporation and there remains in his hands, after payment of court costs and receivership expenses, the amount of $1,000.00 to apply toward the satisfaction of these liens.

CONCLUSIONS OF LAW

1. The employees perfected and fixed their liens upon the specific property of the corporation prior to the commencement of the Receivership action and prior to the filing by the United States Government of its Federal Tax Liens.

2. The employees' liens have priority over all other claims filed with the Receiver, including the Federal Tax Liens.

s Jack Roberts
Judge of the 126th District
Court of Travis County, Texas

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 21 1960
JAMES R. BROWNING, Clerk

No. 353

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE F. MILLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Illinois v. *Campbell*, 329 U.S. 362	5
Illinois v. *United States*, 328 U.S. 8	5
Massachusetts v. *United States*, 333 U.S. 611	5
Price v. *United States*, 269 U.S. 492	5
Spokane County v. *United States*, 279 U.S. 80	5
United States v. *Calotta*, 350 U.S. 808, reversing 224 Miss. 33	4
United States v. *Gilbert Associates*, 345 U.S. 361	5
United States v. *Hulley*, 358 U.S. 66, reversing 102 So. 2d 500	4
United States v. *New Britain*, 347 U.S. 81	5
United States v. *Oklahoma*, 261 U.S. 253	5
United States v. *State Bank of North Carolina*, 6 Pet. 29	5
United States v. *Vorreiter*, 355 U.S. 15, reversing 134 Colo. 543	4
United States v. *Waddill Co.*, 323 U.S. 353	5
United States v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing 227 F. 2d 359	4

Statutes:

	Page
Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):	
§ 6321	3, 4
§ 6322	4
Revised Statutes, § 3466, 31 U.S.C. 191	3, 5
Texas Revised Civil Statutes, 1925 (16 Vernon's Tex. Civ. Stat. Ann. (1958)):	
Art. 5483	2
Art. 5486	2

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 353

GEORGE F. MILLER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (Pet. 18–34) is reported at 331 S.W. 2d 436. The findings of fact and conclusions of law of the District Court of Travis County, 126th Judicial District (Pet. 44–48), are not reported.

JURISDICTION

The Court of Civil Appeals entered its judgment on January 20, 1960 (Pet. 34–35), and denied petitioners' motion for rehearing on February 10, 1960. (Pet. 35.) The Supreme Court of Texas denied petitioners' application for a writ of error on April 27, 1960 (Pet. 36–37), and denied petitioners' motion for rehearing on May 25, 1960 (Pet. 37–38). The

petition for a writ for certiorari was filed on August 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the federal tax lien created by § 6321 of the Internal Revenue Code of 1954 attaches to property of the taxpayer in the hands of a state-appointed receiver on the date of the assessment.

2. Whether taxes due the United States from an insolvent debtor are entitled to priority under R.S. § 3466 over wage claims secured by a statutory lien but not reduced to judgment.

STATUTES INVOLVED

Sections 6321 and 6322 of the Internal Revenue Code of 1954; R.S. § 3466 (31 U.S.C. 191); and Articles 5483 and 5486 of Texas Revised Civil Statutes, 1925 (16 Vernon's Tex. Civ. Stat. Ann. (1958), Art. 5483, 5486) are printed in the petition at pp. 14–17.

STATEMENT

On August 30 and September 2, 1958, petitioners filed, in accordance with Article 5486, Tex. Rev. Civ. Stat. (Pet. 15–16), notices of liens for unpaid wages in the amount of $1,130.29 against the assets of their employer, Capitol Coach Manufacturing Company (Pet. 45).

On September 19, 1958, the Company then being insolvent, a receivership proceeding was instituted in the District Court of Travis County, Texas. On September 30, 1958, a receiver was appointed and took possession of all the assets of the Company. The

assets were sold on November 4, 1958, and, after payment of expenses and court costs, there remains in the hands of the receiver for distribution to creditors approximately $1,000 (Pet. 46–48).

On January 12, 1959, petitioners intervened in the receivership proceeding and moved the court to foreclose their liens upon the assets of the Company and order satisfaction of the liens out of the proceeds of the sale of the assets (Pet. 47).

On January 22, 1959, the Commissioner of Internal Revenue assessed against the Company withholding and unemployment taxes totalling $1,482. Notice of a federal tax lien in that amount was filed with the County Clerk of Travis County on January 27, 1959 (Pet. 47). The United States thereafter intervened in the receivership proceedings and sought payment of its tax claim prior to payment of petitioners' wage claims.

The District Court held that petitioners' mechanics' liens were perfected prior to the creation of the federal tax lien and hence superior (Pet. 48) and directed distribution of the remaining $1000 to petitioners (Pet. 39–43). The Court of Civil Appeals reversed, holding that the mechanics' liens, not having been reduced to judgment, were inchoate under the test established by this Court and hence inferior to the subsequently-arising tax lien created by § 6321 of the Internal Revenue Code of 1954. Alternatively, it observed that the tax debt due the United States would be entitled to priority under R.S. § 3466 (31 U.S.C. 191) quite apart from the effect of the tax lien (Pet. 18–34). The Supreme Court of Texas,

finding no error, denied petitioners' application for a writ of error (Pet. 36).

ARGUMENT

1. It is established by the decisions of this Court that a statutory mechanics' lien, even though recorded pursuant to state procedure, remains inchoate until reduced to judgment and cannot prevail against a subsequently-arising federal tax lien under § 6321 of the Code. *United States* v. *Colotta*, 350 U.S. 808, reversing 224 Miss. 33; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing 227 F. 2d 359 (C.A. 7); *United States* v. *Vorreiter*, 355 U.S. 15, reversing 134 Colo. 543; and *United States* v. *Hulley*, 358 U.S. 66, reversing 102 So. 2d 500 (Fla.). Petitioners do not dispute that established rule but contend instead that no tax lien ever arose against the assets held by the receiver.

Petitioners' argument is that the lien attaches only to property of the taxpayer—i.e., the Company itself—and that at the date of the assessment title to the property had vested in the receiver and hence the "taxpayer" then had no property to which the lien could attach. The argument is without substance. Section 6321 of the Code provides that "If any person liable to pay any tax" fails to do so on demand, the amount of the tax shall, from the date of assessment (§ 6322), "be a lien * * * upon all property and rights to property * * * belonging to such person" (Pet. 16–17.) When title to the property vested in the receiver in trust for the benefit of the Company's creditors (including the United States), the receiver stepped into the shoes of the Company and became

the "person liable to pay [the] tax." Even viewing the assets as being property "belonging to" the receiver rather than the Company, therefore, they were nevertheless subject to the lien under the express terms of the statute.

2. Whether a lien for the taxes was created is immaterial in any event, for under R.S. § 3466 (31 U.S.C. 191; Pet. 17) debts due the United States[1] are, upon insolvency, entitled to priority whether or not secured by a lien. *United States* v. *New Britain*, 347 U.S. 81, 85. While there remains a question to what extent the statutory priority takes precedence over liens perfected before insolvency, it is established beyond dispute that the priority preempts prior inchoate liens. See *United States* v. *Waddill Co.*, 323 U.S. 353, 355; *Illinois* v. *Campbell*, 329 U.S. 362, 370; *United States* v. *Gilbert Associates*, 345 U.S. 361, 365. As the cases cited in point 1 establish, mechanics' liens of the sort involved here remain inchoate until reduced to judgment. Petitioners' liens were not reduced to judgment until after the receiver was appointed—the time at which the priority under R.S. § 3466 attached[2]—and accordingly could not take precedence over the tax claim.

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[1] Taxes are "debts" due the United States within the meaning of R.S. § 3466 (*Price* v. *United States*, 269 U.S. 492, 499-501; *Illinois* v. *United States*, 328 U.S. 8) and are entitled to priority whether or not presently due and payable at the date of insolvency (*Price* v. *United States*, *supra*; *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 34-39).

[2] *Spokane County* v. *United States*, 279 U.S. 80, 93; *United States* v. *Oklahoma*, 261 U.S. 253, 260; *Massachusetts* v. *United States*, 333 U.S. 611, 617 n. 8, 625.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960